



The Comptroller General
of the United States

Washington, D.C. 20548

J. Kowitz

Decision

Matter of: Inter-Con Security Systems, Inc.
File: B-227008
Date: July 24, 1987

DIGEST

1. Small Business Administration's (SBA) Standard Operating Procedure regarding the award of section 8(a) contracts represents internal agency policy and procedures without the force and effect of law; General Accounting Office thus will not review SBA's compliance with these procedures.
2. Allegation of bad faith on the part of the contracting officer in deciding not to award a follow-on section 8(a) contract to protester is denied where protester fails to offer irrefutable proof that the contracting officer had a specific, malicious intent to cause it harm.

DECISION

Inter-Con Security Systems, Inc., a minority-owned small business concern, protests its exclusion from consideration for a follow-on to its contract under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), to provide the Navy with support services at various Naval facilities in San Diego, California. Inter-Con contends that the Navy's award of this successor contract to another firm under section 8(a) was contrary to the Standard Operating Procedure of the Small Business Administration (SBA), and that the contracting officer acted in bad faith during the course of this procurement.

We deny the protest.

Inter-Con, the incumbent section 8(a) contractor, performed the base support services at the Navy's San Diego facilities from August 1983 through April 1987. In December 1985, Inter-Con graduated from the section 8(a) program, and thereby became ineligible for new awards under this program. Before the expiration of its contract, Inter-Con was advised of the Navy's intent to continue to procure the base support services under the section 8(a) program. During a meeting with the contracting officer on February 10, 1987, Inter-Con stated that it would suffer grave economic injury if it

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were not awarded the follow-on contract. It therefore requested that this procurement not be restricted to current participants in the section 8(a) program, and that it instead be opened to all small business concerns. Inter-Con also advised the contracting officer that, considering its status as both the incumbent contractor and a graduate of the section 8(a) program, restricting the competition to current 8(a) program participants would violate SBA procedures. After discussing the matter with the Regional Administrator for Minority Small Businesses, the contracting officer, without notifying Inter-Con, made an 8(a) award to Executive Building Services for the follow-on contract. Inter-Con states that it first learned of this final action on April 6, 1987.

Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The thrust of the section 8(a) program is to insulate participants from open price competition with established firms until the section 8(a) firms are capable of so competing. See Winfield Mfg. Co., Inc., B-218537, June 12, 1985, 85-1 CPD ¶ 679, SBA and contracting agencies enjoy broad discretion in arriving at section 8(a) contracting arrangements and, therefore, our review of actions under the section 8(a) program is limited to determining whether applicable regulations have been followed and whether there has been fraud or bad faith on the part of government officials. Id.

Inter-Con asserts that both the SBA and the Navy abused their discretion here as this section 8(a) award violated longstanding policies of the SBA as expressed in SBA's Standard Operating Procedure. These policies, Inter-Con maintains, prohibit section 8(a) awards where, as here, such awards would cause severe economic hardship to another small business concern, and where such an award would preclude a graduate of the section 8(a) program from competing for the award of a follow-on to a contract that was formerly part of its section 8(a) portfolio. This argument is without merit.

SBA's Standard Operating Procedure represents internal SBA policies and guidelines rather than regulations having the force and effect of law. We therefore will not review SBA's compliance with these procedures and, accordingly, Inter-Con's allegations in this regard do not provide a basis upon which to sustain this protest. See A.R.E. Manufacturing Co., B-218116, May 17, 1985, 85-1 CPD ¶ 564.

In any event, contrary to Inter-Con's assertions, SBA's Standard Operating Procedure does not prohibit section 8(a)

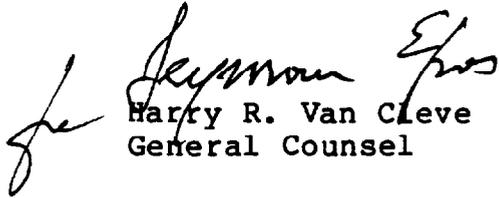
awards in every instance of potential economic hardship to another small business concern, or where the incumbent 8(a) contractor would be precluded from competing for a follow-on contract. Rather, the Procedure merely directs the cognizant official to examine the degree to which an incumbent contractor would suffer economic hardship as a consequence of a section 8(a) award, and to consider this information in determining whether such an award is appropriate in a given case. In no instance does the Procedure require or prohibit the use of particular acquisition methods.

Inter-Con also argues that the contracting officer's failure to apprise it of the Navy's final decision to utilize the section 8(a) program for the subject contract, while knowing that Inter-Con expected such notification, constituted bad faith conduct. Had it been promptly advised, Inter-Con maintains, it would have been able to pursue its concerns directly with the SBA in a timely manner. Inter-Con alleges that the contracting officer's failure, except on one occasion, to contact SBA regarding its concerns, similarly constituted bad faith conduct.

The protester bears a very heavy burden of proof when alleging bad faith on the part of government officials. To show that the contracting officer acted in bad faith, Inter-Con would have to present virtually irrefutable proof that the official had a specific and malicious intent to injure it. See International Business Services, Inc., B-209279, Oct. 20, 1982, 82-2 CPD ¶ 354. The mere showing that the contracting officer did not, as promised, inform Inter-Con of the Navy's decision to award the contract, and that the contracting officer may not have pursued this matter with the SBA as vigorously as Inter-Con desired, simply does not evidence any intent to harm Inter-Con. In fact, far from showing that the contracting officer intended to harm Inter-Con, the record demonstrates that the contracting officer recognized Inter-Con's position and considered its concerns. Specifically, the contracting officer (or another individual in the contracting office), notified Inter-Con early on of the Navy's plan to procure the follow-on contract under the section 8(a) program; met

with Inter-Con to discuss its concerns about this proposed award; and immediately referred Inter-Con's contentions to the SBA for its consideration.

The protest is denied.


Harry R. Van Cleave
General Counsel